SCIENTEX INDUSTRIES BHD.

v.

TEOH CHIN KOK & ANOR.

HIGH COURT MALAYA, KUALA LUMPUR
DATO' SITI NORMA BTE YAAKOB J.
[ORIGINATING MOTION NO. R1-25-21-91]
30 AUGUST 1994

INDUSTRIAL LAW: Claim for unfair dismissal - Company not present for hearing - Industrial Court determining claimant's case and making award - Claimant awarded backwages and compensation in lieu of reinstatement - Company applying for writ of certiorari to quash award made by Industrial Court.

The claimant's case before the Industrial Court was fixed for hearing on 10 and 12 February 1993. On 10 February 1993, the claimant and his solicitor was present but the company and its representatives were absent. The Court stood the matter down for one hour to enable the company to turn up and on the company's failure to do so, the Court invoked the provisions of s. 29(d) of the Industrial Relations Act 1967 (the Act) and determined the case in the absence of the company and its Counsel. The company applied for a writ of *certiorari* to quash the award made by the Industrial Court.

Held:

[1] Whilst the Industrial Court is empowered, by s. 29(d) of the Act, with the discretion to hear a case in the absence of any party, that discretion however must be exercised with due care and diligence. Considering that the applicant had already filed its statement of reply disputing the first respondent's contention that his dismissal was without just cause or excuse and that 10 February 1993 was only the first date of hearing, the Industrial Court should have adjourned the hearing to 12 February, the second day of hearing, so that there was ample time to contact the applicant or its Counsel as opposed to standing the case down for one hour.

[2] In hearing and determining a case in the absence of a party, the Industrial Court must consider all relevant evidence, oral and documentary, to arrive at its decision. In this instance the Industrial Court failed to consider the applicant's statement of reply where every averment of the first respondent's claim had been replied and disputed, and this omission to consider the statement of reply amounted to a jurisdictional error committed by the Industrial Court.

[Application for writ of certiorari to quash Award No. 48 of 1993 allowed with costs].

Legislation referred to:
Industrial Relations Act 1967, ss. 29(d), 30(5)

For the applicant - M.F. Chang (K.M. Chan with her); M/s. Lim Kian Leong & Co.
For the respondent - N. Mahalingam; M/s. Genga Maha Wong & Co.

JUDGMENT

Siti Norma Bte Yaakob J:

The applicant in these proceedings had employed the first respondent on 1 February 1983 as its sales executive but dismissed him on 9 April 1991 following a domestic inquiry as to his conduct in failing to come to work.

Claiming that he had been unlawfully dismissed, the first respondent referred the matter to the Industrial Relations Department. Following a conciliatory meeting, initiated by the Industrial Relations Department, the first respondent was reinstated on 2 May 1991. However he claims that he has not been given any work after he reported for duty on 2 May 1991 but instead he was transferred to another company known as Wovertex Sdn. Bhd. a subsidiary of the applicant, in Malacca, as its personnel manager.

Claiming that such a transfer was a demotion and that he was not paid one week's wages, the first respondent complained to the Industrial Relations Department again and following another conciliatory meeting the applicant agreed to cancel the transfer order and to pay the first respondent his one week's wages.

However when the first respondent reported to the applicant, he alleged for the third time that he was given no work and he referred the matter to the Industrial Relations Department again. This time the Minister of Human Resources referred the matter to the Industrial Court, the second respondent.

The case was first mentioned before the second respondent on 25 June 1992 in the presence of solicitors for the applicant and the first respondent and the case was fixed for hearing for two days on 10 February 1993 and 12 February 1993. Notices of hearing were subsequently issued by the second respondent on 14 July 1992 confirming the dates of hearing and the notices were received by the solicitors of both the applicant and the first respondent.

However on 10 February 1993, the first day of hearing, only the first respondent and his Counsel were present, but not the applicant or its Counsel. The case was stood down for an hour to enable the applicant's Counsel to be contacted but neither the applicant nor its Counsel were present when the case was called again at 11.00 a.m.

The first respondent urged the second respondent to invoke s. 29(d) of the Industrial Relations Act 1967 (the Act) to hear and determine the case in the absence of the applicant and its Counsel which the second respondent did. Upon hearing the first respondent and considering the documents produced by him, the second respondent handed down Award No. 48 of 1993 allowing the first respondent's claim that he had been dismissed by the applicant without just cause or excuse and also awarded the first respondent:

(1) 17 months of back wages totalling RM39,780

(2) 6 months of travelling allowance at RM900

(3) a claim for car maintenance at RM300

(4) *ex-gratia* payment calculated at 25% of the first respondent's basic salary at RM580

(5) compensation in lieu of reinstatement calculated on the basis of eight months salary amounting to RM18,720

The monetary awards total RM60,280.

It is to quash the above Award No. 48 of 1993 that the applicant had initiated the instant proceedings, and seeks for an order of *certiorari*. For this the applicant relies on three grounds.

(1) That the second respondent had acted in breach of natural justice in not allowing it the chance to be heard.

(2) That the second respondent had committed a jurisdictional error in failing to consider its case.

(3) That the second respondent should have exercised its discretion under s. 30(5) of the Act to postpone the case.

Whilst the second respondent is empowered by s. 29(d) of the Act with the discretion to hear a case in the absence of any party, that discretion however must be exercised with due care and diligence. Considering that the applicant had already filed its statement of reply disputing the first respondent's contention that his dismissal was without just cause or excuse and that 10 February 1992 was only the first date of hearing, the second respondent should have adjourned the hearing to 12 February 1993, the second day of hearing, so that there is ample time to contact the applicant or its Counsel as opposed to standing the case down for one hour.

Quite apart from that, there is the issue of whether the second respondent had committed any jurisdictional error when it failed to consider the applicant's case before handing down Award No. 48 of 1993. I answer this in the affirmative as from the records it is very clear that the second respondent had failed to do so when it decided to hear the case in the absence of the applicant. As I had indicated earlier the second respondent has the jurisdiction to hear and determine the case in the absence of the applicant. But in doing so it must consider all relevant evidence, oral and documentary to arrive at its decision. In this instance the second respondent had failed to consider the applicant's statement of reply where every averment of the first respondent's claim had been replied and disputed and it is this omission to consider the statement of reply that amounts to what, I consider, to be the jurisdictional error committed by the second respondent.

It is on this finding that I had allowed the applicant's originating motion with costs to quash Award No. 48 of 1993 by way of *certiorari*.